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April 18, 2019

VIA E-MAIL

Boston College Office of the Dean of Students Maloney Hall, Suite 448 140 Commonwealth Avenue Chestnut Hill, MA 02467-3859

Re: Title IX Investigation involving and
Dear Dean O'Driscoll and Ms. Davis,
On January 23, 2018, received a letter advising him that he allegedly violated Boston College's Sexual Misconduct Policy (the Code) 80 days earlier. The letter detailed, "(s)pecifically, it is alleged that into the early morning hours of November 4, 2018 in your residence hall room in sexually assaulted by engaging in non-consensual sexual contact through kissing and touching of intimate body parts and penetrating her vagina with your penis without her consent while was incapacitated." The letter also advised of a second allegation related to an earlier encounter at non-consensual touching." Neither charge is true and the investigation did not reveal any credible evidence necessary to support a finding of responsibility. In fact, the opposite is true, the evidence contained in the Evidence Binder underscores that not only did not lack capacity to engage in a consensual sexual encounter, she was an active participant in the sexual encounter.
"NON-CONSENSUAL TOUCHING" AT
is charged with a "non-consensual touching" at the Code defines Sexual Contact as including
"intentional contact with the intimate parts of another person, causing another person to touch one's intimate parts, or disrobing or exposure of another person without permission. Intimate parts may include the breast, genitals, buttocks, groin, mouth, or any other part of the body that is touched in a sexual manner.

Sexual contact includes kissing and attempted sexual penetration."

In her first interview, states that she "remembered that put his arm around her waist and pulled her close to him." This interaction is later described in the

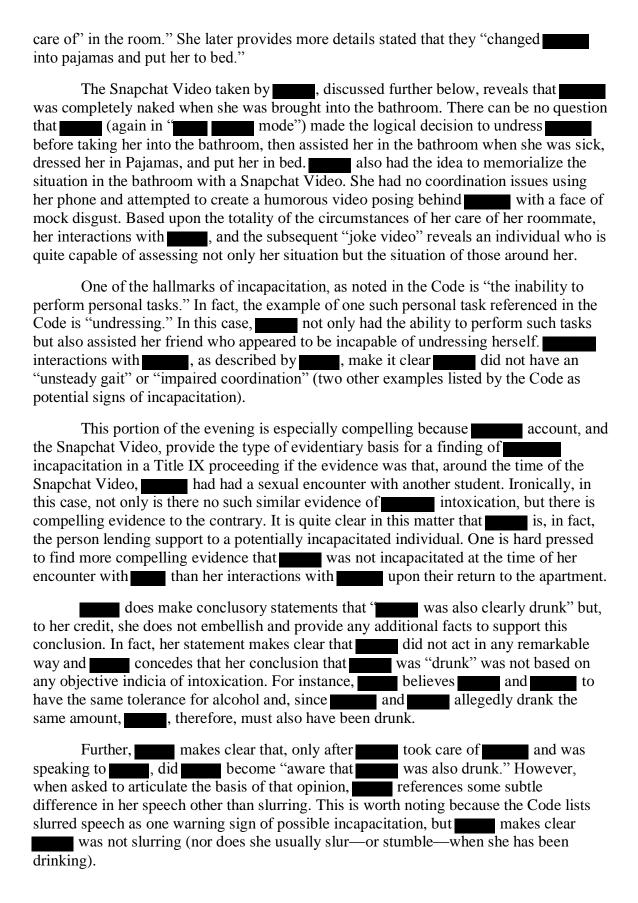
summary as "hugging her to him." In the second interview, states "pulled her towards him by the waist, in a hug, as they stood in line." Presumably, this charge (incapacitation is not referenced in the January 23 letter as to this charge) is a Code violation because allegedly, unsolicited, did the above-described conduct. This charge is unsupported by the evidence. First, based on alone, one is hard pressed to deem her "waist" an "intimate part" or, for that matter, that he touched her waist in a "sexual manner." Her testimony is that in among other students and Boston College staff, an acquaintance pulled her close to him by the waist. That is the extent of the conduct. In light of the innocuous nature of this conduct, it is no wonder why , while he does not dispute that the two could have hugged, has no memory of this exchange. Second, the relationship between the parties and the location of the encounter is relevant when determining whether a particular physical touching warrants an adverse Title IX finding. Context matters. For instance, if a complete stranger (or even an acquaintance) pulled a complainant towards him by the waist in an empty dark room when the complainant was retrieving her coat at the end of a house party one could possibly understand the charge. Here you have two acquaintances greeting each other on a line in a well-lit Boston College facility with other students and staff around. Additionally, in her second interview, concedes that at the time of this touching it was "hard" to say whether or not "was flirting with her or she was with him." Further, not only did she admit she was generally "flirty" but continued that she was a "nice person and therefore would not ignore someone she knew (or for that matter 'other people she does not know well')" while standing on line. Third, the Evidence Binder has several examples of similarly innocent interactions between and individuals at the itself as well as one with from weeks earlier. For example, references seeing at the beginning of year at a party. The two said hello and "gave her a hug." Was that unwanted? Was that a violation of the Code? For that matter, on the night in question, approached and hugged him. noted that she was "outgoing" and "touchy" that night. told the Investigative team that . In acting "uncharacteristically flirtatious" while at the interview she provided additional information about her interactions with : she touched his "leg at the party." Further, she "explained this was something she had "done in the past to people when [she] was drunk." She labelled such conduct a "harmless and playful" gesture. Similarly, said in her second interview that she "could have made a flirty move" towards when they were at a party earlier in the year, at which she was intoxicated. In light of the allegation related to the interaction, all of above-described conduct could be recast as Title IX violations. That, of course, would be unreasonable. All of these incidents are commonplace interactions between people who know one another. None could be considered untoward or inappropriate. Similarly, the touching in cannot possibly be the type of problematic conduct envisioned by

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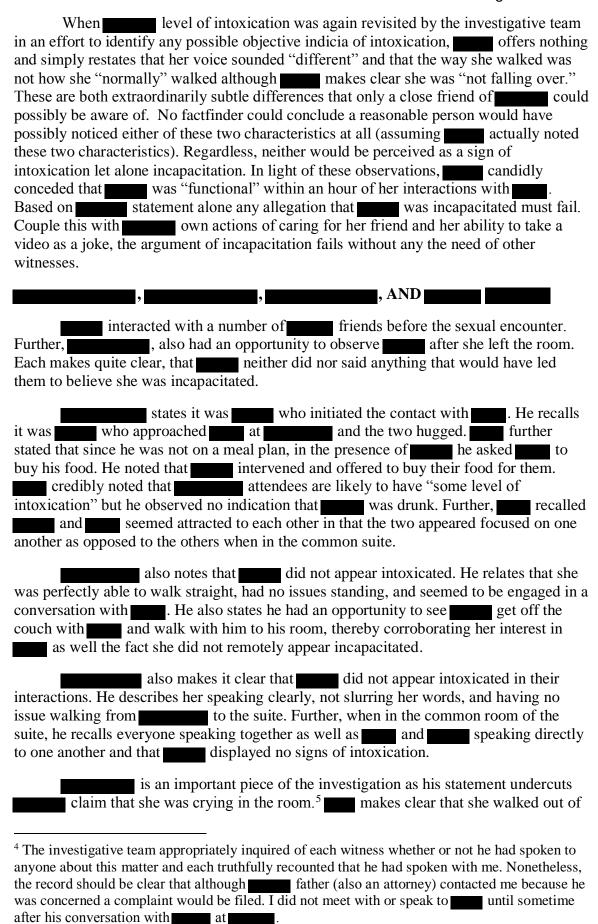
the Code. If deems her own similar conduct as "harmless and playful," one cannot then label similarly innocuous conduct by as a Code violation. 1

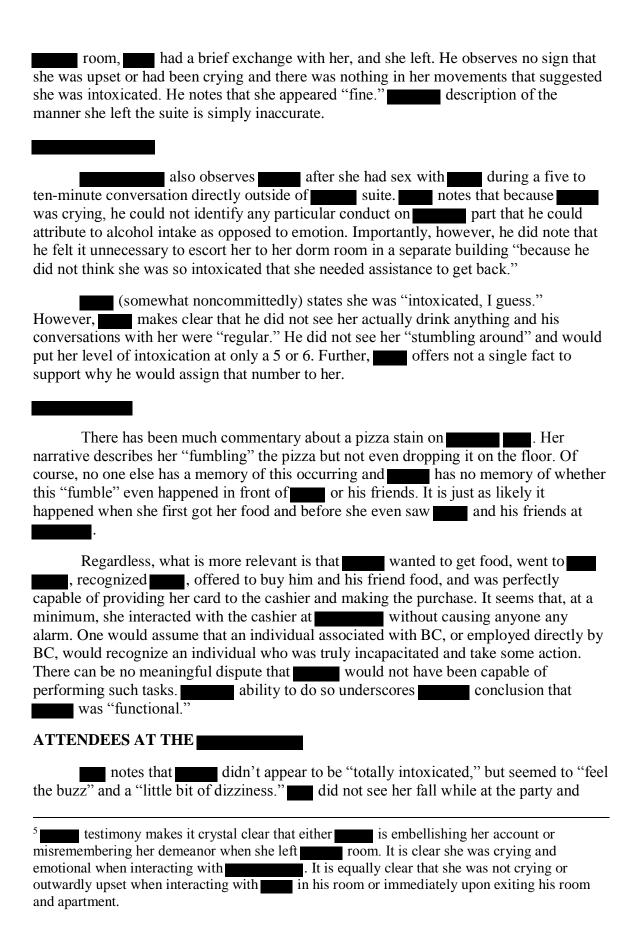
WAS NOT INCAPACITATED ON NOVEMBER 4, 2018

The Code states that "incapacitation is the inability to make informed, rational judgments and decisions." The University's determination of whether "knew, or reasonably should have known under the circumstances, whether was incapacitated" will be based on the perspective of a reasonable person in position. First, was not, in fact, incapacitated that evening. Further, (and not surprisingly as she was not incapacitated), no reasonable person in position (or the six other people who interacted with her immediately before and after her interaction with would have known, or reasonably should have known, that she was incapacitated. A full review of the Evidence Binder—the documentary evidence as well as witness accounts—make this conclusion irrefutable.
Although, there are a number of witnesses and evidence that both individually and collectively reveal was not incapacitated, it is roommate, who provides some of the most compelling evidence that was not incapacitated. is critically important because 1) she interacted with proximate in time to interactions with \$\int_{\text{2}}\) was completely sober, and 3) is a roommate and a particularly close friend of \$\int_{\text{3}}\), whose loyalty clearly lies with \$\int_{\text{4}}\).
description of when she and returned from the irrefutably shows that was perfectly able to make informed, rational judgments and decisions (or, again, at a minimum, no reasonable person would have believed based on actions that she was incapacitated). The makes clear that, despite whatever alcohol had consumed, she was perfectly able to shift to mode and assist in any number of personal tasks. Further, upon return to the apartment, determined she needed assistance in order to help and decided to solicit the aid of Recognizing the hour of the day, "knocked lightly" at the door to determine if was awake. states that they "got "," "taken
It is worth noting that failure to remember this hug speaks volumes as to his credibility. His own friend, recalls it was who initiated this hug. simply does not recall the interaction and candidly said so. Although, he easily could have adopted memory as his own or simply claimed that she hugged him first (which would have been entirely consistent with the way was acting that evening) he did not. He has been a credible and truthful witness throughout this process.
spent time with within 30 minutes of meeting at a (and within an hour of the sexual encounter). There is a photograph in exhibit 25 of a photo of and and at 1:15 a.m. and purchased the food at 1:42 am. Obviously, remained with for some amount of time after the photograph was taken and saw at least several minutes before purchasing the food.
These facts also call into question claim that she does not remember much of her interactions from that evening. Her memory of recruiting to assist with was provably intact because the next day, during a text exchange with she apologized for waking up and then when reminds that she was already awake, notes, "you were close to sleeping tho."



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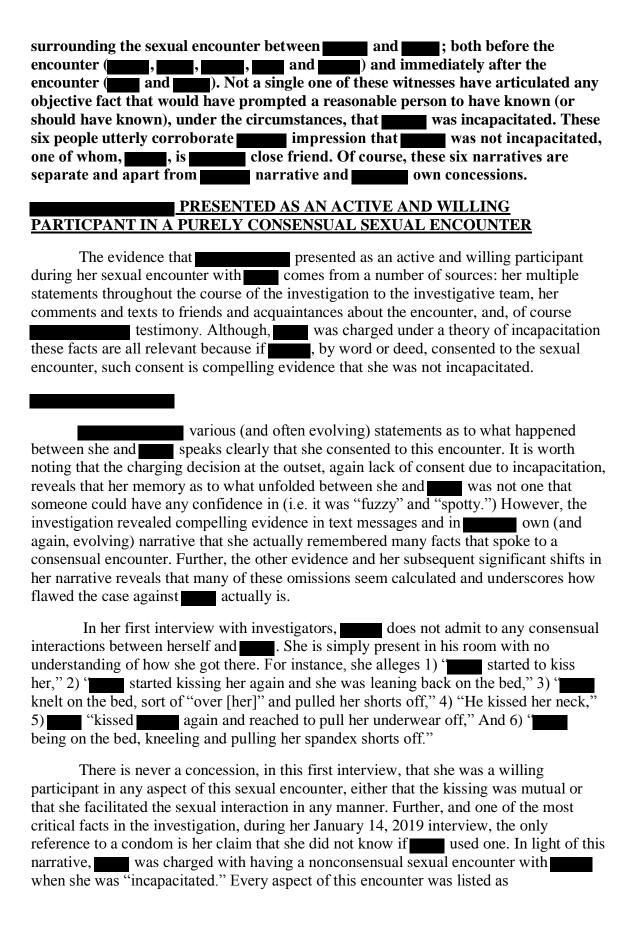




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notes that she was capable of dancing "sexually" in that she was "grinding" and

"twerking." The only objective evidence of any drunkenness he references in his statement is that she did not walk in a straight line and "bumped into her friend" when he saw her walking away. This description, in and of itself, is very limited as to what it describes, and any issues it raises is quickly resolved by an arrative and the other evidence discussed throughout this submission. Further, as far as dancing at the party, herself, makes it clear (despite her claim that her motor skills were "not great") she was quite coordinated. She recalls, "repeatedly" "dropping it low" when she was dancing. Nonetheless, she notes that despite being in this more challenging physical position repeatedly she only fell once. Additionally, although she notes that she was "really drunk" at the also relates that she asked another student to "hold her phone because she did not want to lose it and had no pockets." This request is important because it is a small, yet revealing, example of the fact that, despite her conclusory self-assessment that she was "really drunk," she was making rational decisions as it related to her property. broadly concludes that everyone at the party was intoxicated but explains that "no one seemed to be at a level of 'concern." concludes that he would rate as a 5 or 6. It is unclear why he assigned this number to offers not a single fact that would reveal she had been drinking and he specifically notes he did not see her stumble or fall. ranks as a 7 or 8 and states she was "definitely intoxicated." However, when explaining that conclusion, the only "red flag" to was that was more "outgoing" and that she was "touchy." Neither of these descriptions, on their face, would indicate to anyone but closest friends that she had been drinking. No reasonable person would perceive the behavior described by as problematic or remotely indicative of an incapacitated state. as heavily intoxicated. Somewhat tellingly, he paints proactively notes his concern that his "opinion might be labeled 'biased'" because of his relationship with statement might also be labelled biased because he was the only one of 18 witnesses who felt obligated to offer his opinion on the core issue in the case: he claims was "beyond the point of being able to give consent." Fortunately, statement is so at odds with the other testimony it is rendered meaningless. , all interacted with I in the immediate time period ⁶ As noted above, said that gave him a hug but what he describes as "outgoing and touchy" clearly extends beyond the initial hug he describes. In light of the two distinct charges levied against , it would have been worthwhile to explore in more detail why was "touchy." Whom did see her touch? Where did touch these people? also referred the investigators to who, according to o, was seated "on the couch next to the door where was dancing and fell." was actually at an event at that evening and was not even present. In addition to being "biased" it also seems as is factually inaccurate.



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nonconsensual: the kissing, the touching of intimate body parts, and the vaginal penetration.

It is worth noting that even in this first interview, concedes that stopped the encounter when asked. Of course, her ability to instruct to "stop" having sex with her reflects the fact that, whatever amount of alcohol she had, she was still able to make an informed decision and, by her own accounting, tell at this point she wanted the encounter to end; he complied. I know of no other case alleging an incapacitation theory that includes a complainant asking the respondent to end a sexual encounter followed by the respondent, in fact, respecting that decision. How can one be accused of taking advantage of someone who is unable to make informed decisions when this person, in the midst of the encounter, makes the decision to end the encounter?

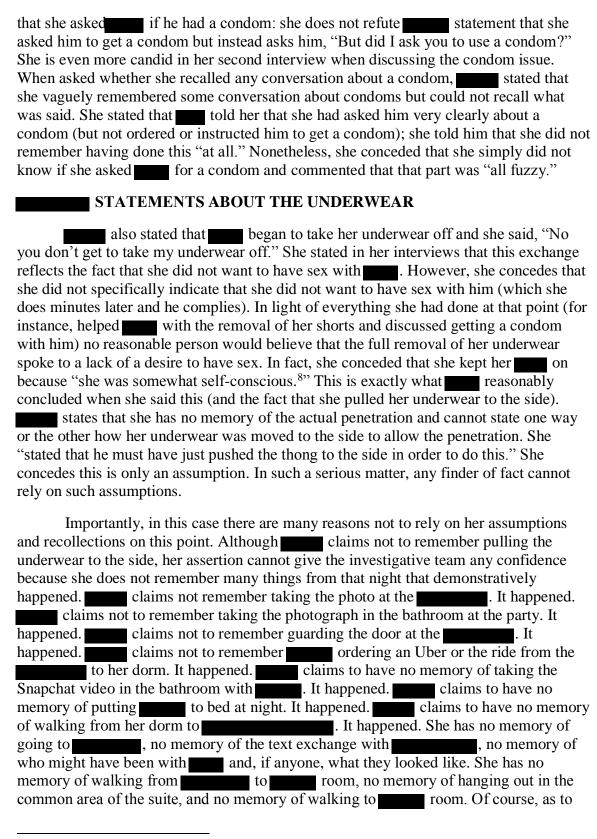
This first interview, (10 weeks after the encounter and after seemingly countless conversations about the incident between her price to the friends, and BC staff) is, objectively, not a candid recounting of the encounter. Her second interview is, in many important ways a recantation of the majority of the allegations from the first interview, and her statements and texts to others, many of which occurred before this January 14 interview, undercut her claims that formed the basis of the charges in the first instance.

In her second interview on March 1, offers concrete additional facts that either speak to the consensual nature of the encounter or concede the likelihood of other facts that confirm arrative as to the consensual nature of the interactions.

First, in the second interview, concedes to the investigative team that she was "making out" with in the stark contrast to her lack of any participation that she had testified to in her first interview. Further, the Evidence Binder makes clear that used this exact phrase to both and the same day of her encounter (that morning) with did not want to admit this critical fact to the investigative team in the first interview, although it is obvious from the texts to and she clearly remembered her interaction in a fundamentally different way than she articulated to the investigative team at that time. This is relevant, of course, not simply to exonerate but also when more broadly assessing her credibility.

Second, when confronted with clear memory that she instructed him to kiss her neck, conceded that this fact was "probably true" as "she has said this before in consensual situations." This fact further corroborates assertion that was instructing him what to do at various points in the encounter. During her second interview, also conceded that, as had described, she thought she "did lift up her back so that he could pull her shorts off." She further "acknowledged that she did not think she objected to taking the spandex off." This participatory action is an unambiguous, objective sign that any reasonable person would believe indicated a willingness for the sexual encounter to escalate. alleges that she has no memory of what she was thinking or feeling but whether that is true or not is irrelevant: her assisting with the removal of her shorts is a clear sign that she is consenting to the continuing sexual encounter. Moreover, this later concession further illustrates differences to her initial claim whereby she stated that "he pulled her shorts off."

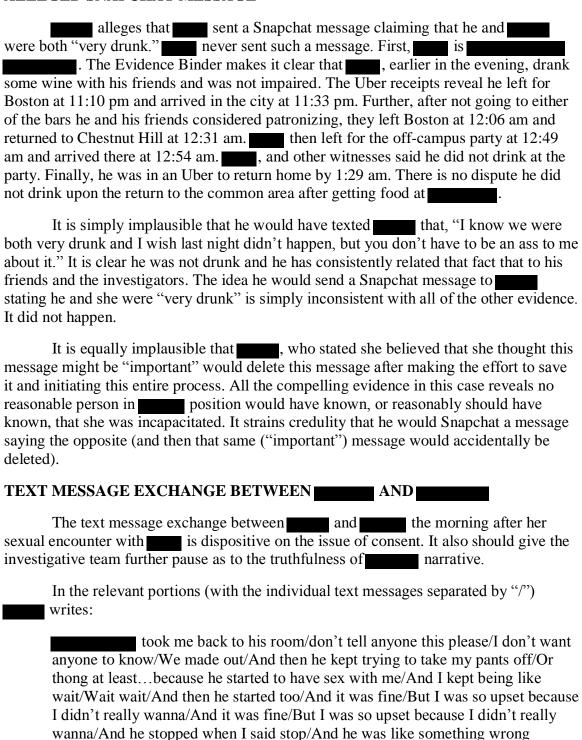
Third, makes it clear that asked him to get a condom and unequivocally corroborates this fact in her second interview. In her first interview, recounts a conversation that she had with at that leaves open the possibility

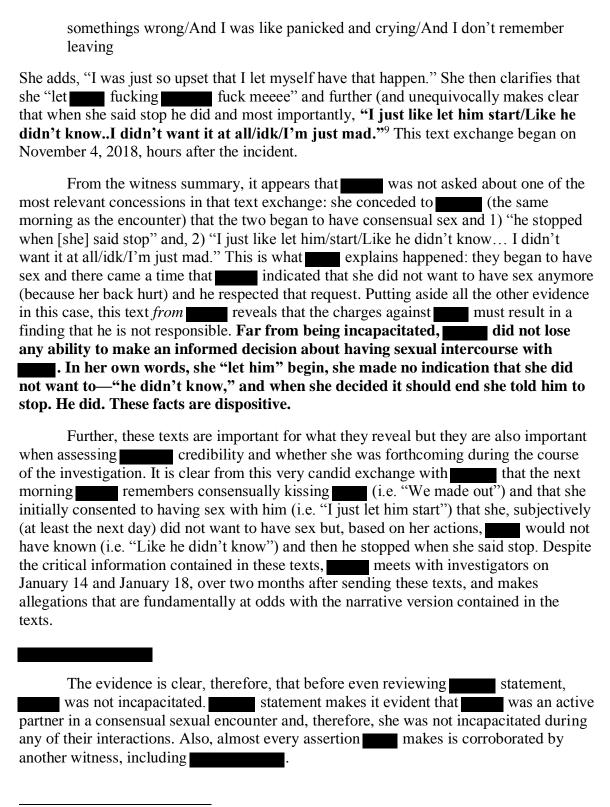


⁸ The fact, discussed below, that she pulled her underwear to the side eliminates this as any issue whatsoever.

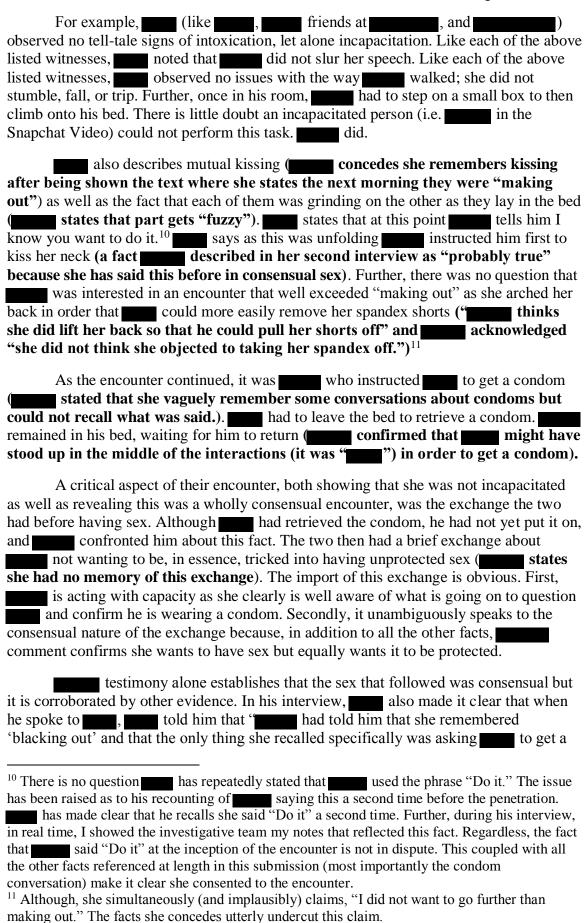
critical parts of the sexual encounter (including the moment after she told not to remove her underwear) are "spotty" and "fuzzy." In any proceeding there has to be quality, credible evidence. None exist in this matter. Whether these lapses in memory are a truthful account or an unwillingness to share additional facts she deems to be embarrassing is irrelevant. There is no compelling narrative that can support a claim of incapacitation or lack of consent.

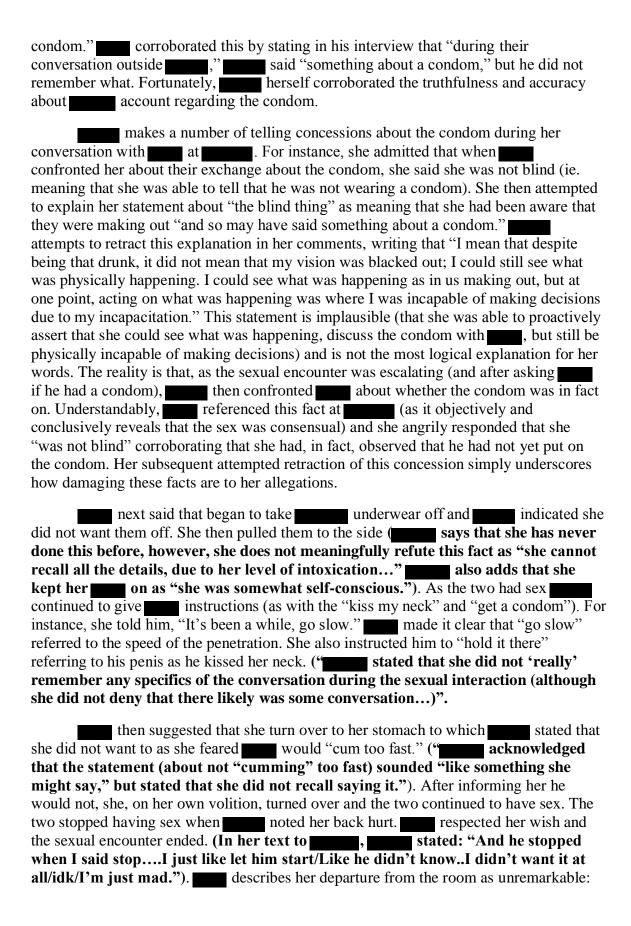
ALLEGED SNAPCHAT MESSAGE

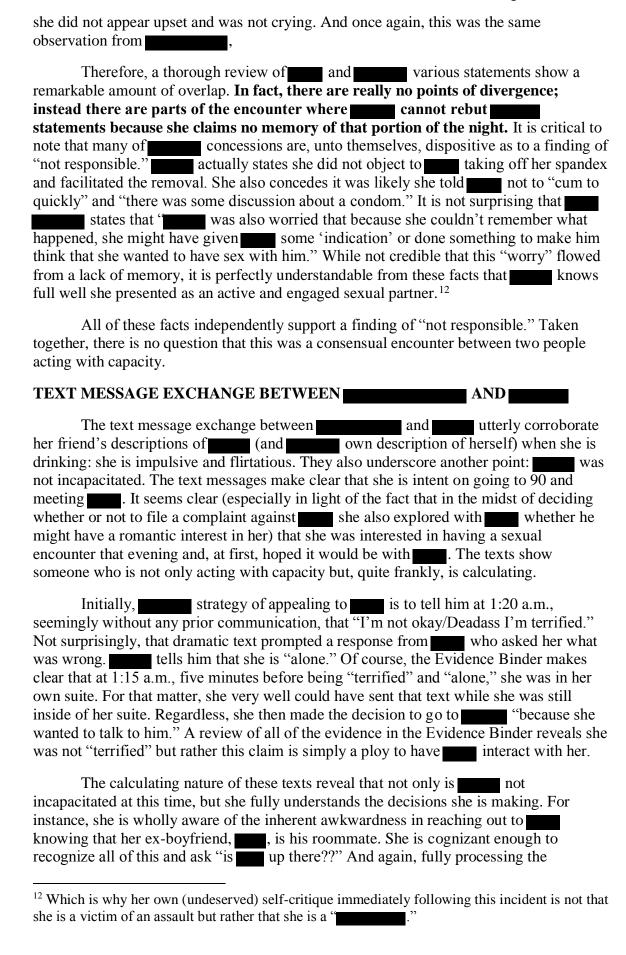




⁹ It is clear that instinctually understands that the reality of this encounter (and what should be the outcome in the case): **no one is to blame**. She writes, "You told him To stop and he did thank god/But don't be mad at yourself/You don't deserve to be mad at yourself. You did nothing wrong."







awkward situation she is potentially creating, texts, "Bad plan but it's happening." While these decisions may reveal a forwardness and lowered inhibitions, they also starkly reveal that was not incapacitated. , however, is seemingly unable to get up to floor and is told repeatedly by that "she just has to chill out" and to "go home." Once again, she tells that she is "alone." She is clearly at at this point because she describes as "handsy" and further states "bro I'm not Trynna be raped/That was aggressive but true" and then immediately attempts to confirm whether is still in his suite. She then (two minutes before buying food) claims that "already tried to" sexually assault her. This is demonstrably absurd and false and is obviously vet another effort (as the "terrified and alone" angle did not work) to prompt a reaction/meeting with . Even by her own claim, simply grabbed waist area and brought her closer to his body. He did not touch her breasts, buttocks, or vaginal area. Not only is this not "handsy" in any meaningful way, it hardly can be considered an attempted assault. Her comments to about are simply an ongoing effort to engage with clearly not an accurate reflection of what she was feeling. Also, this is perhaps the first time in a sexual assault investigation that the "outcry" about a sexual asault i.e. "bro I'm not Tyrnna be raped" *preceded* the sexual assault. And of course, between the "I'm not Trynna be raped" and the actual intercourse text to she "let him start" having sex with her) the (which to quote following happened: bought food, walked with him to his suite, hung out with him in the common area, walked with him to his room, climbed on the step into his bed, remaining with him when he undressed, made out with him, asked him to get a condom, facilitated the removal of her spandex, and pulled her underwear to the side to facilitate the intercourse. It is also worth pointing out that not only do these texts reflect calculated decision-making in the above-described manner, they are also largely devoid of any typos. In fact, on multiple occasions when she makes a typo she recognizes the error and corrects it (i.e. chicken=Chillen** and _____***). This simply corroborates assessment (from minutes earlier) that was "functional" and also corroborates the five other individuals (and) who during that same time period observed no indication that was incapacitated, let alone, intoxicated to any significant degree. **** Many of these facts individually warrant a finding of "not responsible." A collective review of all of the evidence mandates such a finding. Candidly, a reasonable review of this case also supports the conclusion that was genuinely upset about her encounter with the Although, the testimony from and persuasively proves she did not appear upset while in the suite, in short order she was emotional and crying Ironically, the reason she is presenting this way is while interacting with not because she was incapacitated (or that she was forced in any way to have sex). She is upset because she understands that, despite the fact she likely would have preferred to be with that evening, she presented to as a completely willing

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